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IN THE

Supreme Court of the United States

October Term, 2000

THE COLEMAN COMPANY, INC.,

Petitioner,

v.

GERALD E. BROWN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Hoping to downplay the importance of the Tenth Circuit's unprecedented ruling granting broad equitable powers to arbitrators in contract cases, respondent Brown misrepresents both the decision at issue and petitioner Coleman's arguments. As we show, Brown completely fails in his effort to portray this as a routine case not warranting the Court's attention. In fact, it remains clear that the Tenth Circuit issued a ruling on an

important issue of federal law that not only is glaringly wrong, but conflicts with decisions in at least two other circuits.

To begin with, there can be no doubt that the Tenth Circuit affirmed an arbitration award in which the arbitrators refused to enforce the contract's stock options provisions as written and instead granted an "extension of the terms of the options" because that supposedly was an "equitable solution." Pet. App. 51a. In so doing, the Tenth Circuit "h[e]ld that Rule 34(d) of the AAA Employment Disputes Rules permits the crafting of broad equitable relief, and that the panel did not exceed its power by granting the equitable relief of extending the time in which the stock options could be exercised." Pet. App. 8a. The Tenth Circuit held that the AAA Rules authorize such relief *regardless of the terms of the contract.*

Moreover, it is incorrect for Brown to suggest that Coleman has "waived" any challenge to the alternative, contractual basis of the decision below. To the contrary, as Brown recognizes, the linchpin of Coleman's "equity" argument is the assertion, included within the scope of the question presented, that the relief awarded here *cannot* be justified as based on an interpretation of the contract.

Finally, despite Brown's arguments to the contrary, the ruling below inevitably will affect a large number of AAA arbitrations nationwide, given that four million workers presently are covered by AAA-administered dispute resolution plans. *See* AAA, *Introduction to National Rules for the Resolution of Employment Disputes*, 1998 WL 1527109 (A.A.A. Nov. 20, 1998). The Tenth Circuit's decision also will deter contracting parties from using non-litigation alternatives such as arbitration to resolve their disputes: if procedural rules

such as those adopted by the AAA trump express contractual terms, as the Tenth Circuit has effectively held, then parties will retreat from using arbitration as an alternative to litigation. Consequently, the reasons for granting review are compelling, and Brown's arguments to the contrary do not alter that conclusion.

1. Brown accuses Coleman of "completely misstating what the [Tenth Circuit] held." *See* Resp. Opp. 5. He denies that the Tenth Circuit held that Rule 34(d) of the AAA Employment Disputes Rules empowers arbitrators to reject express contractual terms in favor of "equitable" relief that violates the contract. *See* Resp. Opp. 5-6. In fact, however, it is Brown who is misrepresenting the decision below.

In the portion of its decision entitled "Equity," the Tenth Circuit was operating on the assumption that the relief awarded by the arbitrators could not be justified based on the employment contract. It nevertheless "h[e]ld that Rule 34(d) of the AAA Employment Disputes Rules permits the crafting of broad equitable relief, and that the panel did not exceed its power by granting the equitable relief of *extending* the time in which stock options could be exercised." Pet. App. 8a (emphasis added). In holding that the arbitrators acted properly under Rule 34(d) in "extending" the contract's express provisions, the Tenth Circuit stressed a distinction between the language of Rule 34(d) and the language of Rule 45(a) of the AAA Commercial Arbitration Rules. Regarding Rule 45(a), the Tenth Circuit emphasized that it requires that any equitable relief the arbitrators might award be "*within the scope of the agreement of the parties*." Pet. App. 8a (emphasis in original). The Tenth Circuit then proceeded to reason that "[i]f the emphasized language in Rule 45(a) limits the equitable powers

of the arbitrator in commercial arbitrations to the express language of the contract, . . . *the absence of such language in Rule 34(d) would logically mean that the equitable powers of arbitrators operating under the AAA Employment Disputes Rules are not limited to the same extent as under the AAA Commercial Arbitration Rules*." Pet. App. 8a (emphasis added). In other words, the Tenth Circuit held that when fashioning equitable relief under Rule 34(d), arbitrators are not confined to the "scope of the agreement of the parties." Instead, arbitrators enjoy broad authority to fashion any relief they please — even relief that, as here, contradicts the express terms of the governing contract. Notwithstanding Brown's heated denials, this was the clear and unmistakable holding of the Tenth Circuit.

2. Brown also attempts to avoid review of the Tenth Circuit's unprecedented grant of equitable discretion to arbitrators by stressing that the Tenth Circuit ruled in the alternative that the relief at issue could be seen as emanating from an interpretation of the contract. Brown asserts that Coleman has "waived" any challenge to this alternative holding and thus failed to preserve any basis for seeking outright reversal of the Tenth Circuit. *See* Resp. Opp. 4. That assertion plainly is incorrect. The question presented in the petition is premised on the claim that the arbitrators in this case fashioned equitable relief "that contradicts the essence and terms of the contract." *See* Pet. i. Whether the arbitrators' award does so is a subsidiary question that is part and parcel of the question Coleman has presented for this Court's review. *See* Sup. Ct. R. 14.1(a) ("The statement of any question presented is deemed to comprise every subsidiary question fairly included therein"). Thus, Coleman's petition asks this Court to grant review and

reverse the Tenth Circuit — not simply to review one of its alternative holdings.[1/]

3. In a further attempt to downplay the impact of the decision below, Brown insists that Coleman "dramatically misstates the effect of the Tenth Circuit's decision on future cases" — apparently because parties may refuse to incorporate the AAA Rules into their contracts. *See* Resp. Opp. 7. That argument sidesteps the present-day reality that arbitration clauses incorporating the AAA Rules already have been incorporated into countless employment contracts. Indeed, as stated above, the AAA recently estimated that some *four million* workers are covered by its dispute resolution plans. *See* AAA, *Introduction to National Rules for the Resolution of Employment Disputes*, 1998 WL 1527109 (A.A.A. Nov. 20, 1998); *see also* Brief of Amicus Curiae American Arbitration

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1/ Respondent does not even attempt to defend on the merits the Tenth Circuit's holding that the arbitrators' award constitutes a permissible interpretation of the contract. The Tenth Circuit concluded that the arbitrators' $2.3 million stock options award was justified because the "arbitration panel found Coleman had failed to properly terminate Brown for cause under paragraph 5(c) of the contract" and "did not meet the requirements for terminating Brown without cause under paragraph 5(f)" since "proper notice was never given as required by paragraph 5(g)." Pet. App. 6a. In reaching this conclusion, the Tenth Circuit overlooked that the adequacy of the termination notice was raised by Brown for the first time on appeal and was never addressed by the arbitrators. Indeed, the arbitrators' award does not even mention any of the three contractual provisions cited by the Tenth Circuit — much less find that Coleman failed to comply with their requirements. Thus, there is absolutely no basis for the Tenth Circuit's conclusion that the arbitrators interpreted the terms of the contract in rendering their award.

Ass'n in No. 99-1379, 2000 WL 1132767 (Aug. 7, 2000), *Circuit City Stores, Inc. v. Adams*, at 1 ("Millions of non-union U.S. workers currently are covered by mediation and arbitration agreements that call for administration by the AAA"). Thus, regardless of the *future* ability of parties to avoid AAA Rules, the *present* reality is that they govern millions and millions of employment agreements. Brown ignores this point.

Brown also ignores that AAA Rules often govern the conduct of arbitrations even when parties have not incorporated those Rules into their contracts. *See* Carol L. Izumi, *et al., Proceedings of 1997 Annual Meeting of the Association of American Law Schools Sections on Employment Discrimination Law and Alternative Dispute Resolution*, 1 Employee Rts. & Employment Pol'y J., 269, 282 (1997) (remarks of Marion Zinman of AAA). Thus, even parties that have refused to incorporate the AAA Rules into their contracts may find their arbitrations governed by those Rules.

4. Brown ends by advancing a number of purported distinctions between the facts of this case and the facts of *Wyandot, Inc. v. Local 227, United Food & Commercial Workers Union*, 205 F.3d 922 (6th Cir.), *cert. denied*, 121 S. Ct. 62 (2000), and *Swift Indus., Inc. v. Botany Indus., Inc.*, 466 F.2d 1125 (3d Cir. 1972) — in an effort to show that there is no inter-circuit split warranting review. In the process of doing so, however, Brown misrepresents the pertinent circumstances of this case. For example, Brown states that the arbitration "panel looked to the express terms of the contract in deciding that Brown's termination was tantamount to 'no termination at all.'" *See* Resp. Opp. 9. In fact, this Court will search the arbitration award in vain for any hint that the panel "looked to the express terms of the contract in deciding that Brown's termination" did

not comply with the contract's requirements. It is not there. Indeed, the three contractual provisions cited by Brown and the Tenth Circuit for the proposition that "the panel found that Brown was never properly terminated under the contract's termination clauses" (Resp. Opp. 9; Pet. App. 6a) — paragraph 5(c), paragraph 5(f), and paragraph 5(g) — *are not cited, let alone interpreted or applied, in the arbitration award.* Brown's contention in the face of this fact that "the arbitrators clearly applied the specific provisions of the contract when formulating their decision" (Resp. Opp. 9) is, to say the least, disingenuous.

What the arbitrators actually did, contrary to the account advanced by Brown, was "grant an extension of the terms of the options" provided in the contract because the arbitrators "believe[d] that to be an equitable solution." Pet. App. 51a. By affirming this result on the ground that the AAA Rules afforded the arbitrators' broad equitable authority, the Tenth Circuit reached a result that conflicts with the decisions of the Sixth Circuit in *Wyandot* and the Third Circuit in *Swift*, both of which hold that arbitrators cannot fashion "equitable relief" that contradicts the terms of the parties' contract. *See Wyandot*, 205 F.3d at 930; *Swift*, 466 F.2d at 1133-34. The differences in the holdings of the Tenth Circuit in this case, and of the Sixth and Third Circuits in *Wyandot* and *Swift*, cannot be explained away by making fine distinctions in their facts; these reported decisions present this Court with a direct and irreconcilable circuit split that warrants review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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